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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-332

CHARLES LAURENT FIOCCONI and JEAN CLAUDE KELLA,

Petitioners,

-v.-

ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES ATTORNEY, and UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, and WARDEN, FEDERAL DETENTION HEADQUARTERS, West Street, N.Y.,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS PURSUANT TO RULE 24(5)

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Of Counsel

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In response to the government's assertion that the Writ should not now issue, in essence, because:

> (1) the issue <u>may</u> become moot <u>if</u> the Italian Ministry of Grace and Justice officially approves the decision of the Court of Appeals of Florence (a decision presently under appeal and which was decided <u>subsequent</u> to what is patently an illegal trial),

(2) the petitioners' rights to the same relief have been "preserved" in their present appeal from an illegal trial (and therefore unlawful conviction) in the Southern District of New York, and

(3) there is no prejudice since the petitioners are presently under a lengthy sentence of imprisonment pursuant to a plea of guilty to the charge for which they were actually extradited,

it should be noted that the reply skirts the real questions: If the trial court in New York had no jurisdiction to try the petitioners, but illegally assumed jurisdiction and thereby acted in violation of law, can the trial court's original lack of jurisdiction be remedied by the government of this country subsequently seeking, and even obtaining, ex post facto "ratification" by a foreign nation of this country's unlawful use of authority? Is it any answer to an original lack of jurisdiction to state that a decision can be deferred because petitioners are exercising their appellate rights as to all issues, including this issue, thereby placing on the petitioners the burden and expense of another appeal when this Court can render a determination of an issue that would be dispositive of the need for further appeals? Can it be fairly stated that there is no prejudice when, as a result of the government's tactics of trying petitioners first in New York, the petitioners were denied the cogent defense of double jeopardy as to the New York charges had they been tried first as to the conspiracy alleged in the Massachusetts indictment and for which they had been extradited? Is there no prejudice where petitioners are under sentence to 25 years imprisonment in New York when they stand sentenced to 19 years imprisonment in Massachusetts under a concurrent sentence?

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In United States ex rel Donnelly v. Mulligan, et al., 74 F.2d 220 (2d Cir. 1934), (cited at p. 11, of the petition) the petitioner there, having been tried and convicted in the district court for the Southern District of New York, was not kept incarcerated, under the charge for which he sought the Writ, until the government of the United States secured official sanction for what the Circuit Court, in essence, presumed to be an act of bad faith at the time of the unlawful conviction.

Inherent in the rationale granting a writ under the circumstances of the instant case is the doctrine that the government should not be able to profit from its own illegal acts. In this instance a dangerous precedent can be created. For what matters rights under extradition law if the right can be flouted until such pressure is brought to bear that an unlawful act can be, posthumously, given sanction and color of right.

CONCLUSION

For these reasons and for the reasons already presented in our Petition for Certiorari, petitioners' rights under the Constitution and Laws of the United States, and the Law of Nations, were violated and their petition for a Writ of Certiorari should be granted so that this Court can consider the important questions of the rights of extradited persons and due process of law.

Respectfully submitted,

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